IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3702 OF 2003
IN
SUIT NO.3961 OF 2003

1) Sai Amrat Co-operative Housing Society Limited, a society duly registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and having their office at C.T.S. No.925/926 Jayawant Sawant Road, Dahisar (West) Mumbai 400 068.

2) Amrat Co-operative Housing Society Limited, a society duly registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and having their office at C.T.S. No.925/926, Jayawant Sawant Road, Dahisar (West) Mumbai 400 068. .. PLAINTIFFS

Versus

1) Shri Chandru Tahilram Tolani of Mumbai Indian inhabitant carrying on business as Builder/ Developer and having his office at 6, Kohinoor, 1st Floor, "D" Wing Plot No.479, 24th Road, Linking Road, Khar (West), Mumbai 400 052

2) Brihanmumbai Mahanagar Palika having its office at Mahapalika Marg, Mumbai 400 001.

3) The Municipal Commissioner of Greater Bombay, having his office at Mahapalika Marg, Mumbai 400 001

4) The Executive Engineer Building Proposals, R/N Ward having his office at Dr.Babasaheb Ambedkar Market Building Kandivli (West), Mumbai 400 067 .. DEFENDANTS

Mr.Sunder S. Bhandary i/b.M/s.Bhandary & Bhandary for the Plaintiffs.

Ms.Phiroza Ankleshwaria with Mr.Mustafa Kanchwala i/b.S.Mahomedbhai & Co. for Plaintiff No.1.

Mr.H.C. Pimple for Defendant Nos.2 to 4.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON : 21ST APRIL 2006

JUDGMENT PRONOUNCED ON : 5TH JUNE 2006

JUDGMENT :

. This Notice of Motion has been taken out for the following reliefs :-

(a) Pending the hearing and final disposal of the suit, the Defendant No.1 be restrained by an order and injunction of this Hon'ble Court from in any manner either by himself or through his agents and servants from entering upon the suit plot, more particularly described in Exhibit "A" hereto and be further restrained from in any manner putting up any work of construction of additional structure or demolishing any part of the compound wall or any other structure in any manner notwithstanding any plan for amendment of the original sanctioned layout plan was passed by the appropriate authorities i.e. by Defendant No.2, 3 or 4 as the case may be;

(b) Pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order and injunction directing the Defendant No.1 to complete the pending work in respect of buildings belonging to the Plaintiffs which work required to be completed by the Defendant No.1 under the provisions of MOFA, within such period as this Hon'ble Court may deem fit and proper in that behalf;

(c) Pending the hearing and final disposal of

the suit, the first Defendant be directed by a mandatory order and injunction of this Hon'ble Court to render true and proper accounts of money taken from the flat purchasers being members of the Plaintiffs and payment made by the first Defendant to statutory authorities, if any, under the terms of the agreement or otherwise, within such period as this Hon'ble Court may deem fit and proper in that behalf;

(d) Cost of the present Notice of Motion be provided for ;

(e) Such further and other orders may be passed as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

2. The Plaintiffs are registered Co-operative Societies. The members of these Societies are flat purchasers in two buildings named Sai Amrat and Amrat. The first Plaintiff has been registered as a Co-operative Society on 30th April 1998, while the second Plaintiff was registered on 12th June 2000. The flat purchasers have purchased flats from Defendant No.1 who has constructed the buildings. These buildings were constructed as per the sanctioned plan which was approved on 18th September 1986. Several amendments to the sanctioned plan were made and the last approval was obtained on 27th February 1997. The building Amrat consists of four wings, A, B, C and D, four row houses and thirty shops. Sai Amrat consists of two wings A and B and six shops. The occupation certificate in respect of A, B and C wings of Amrat has been granted on 29th

October 1991, while it is yet to be granted in respect of D wing and row houses. The occupation certificate in respect of the building Amrat has been granted on 9th April 1994. Accordingly, these wings have been occupied. Apart from this, the Plaintiffs have stated that the D wing and the row houses of Amrat are also occupied, though there is no occupation certificate. The Plaintiffs had called upon the builder, Defendant No.1, to execute the conveyance in their favour after registration of their societies. Defendant No.1 having failed to do so, the Plaintiffs approached the Registrar of Co-operative Societies. Defendant No.1 undertook before the Registrar on 26th May 2000 to convey the property to the Plaintiffs within four months. Under clause 12 of the undertaking given in Form "Z", Defendant No.1 has further undertaken :

> (12) that I/we have not made and will not make any alterations in the structure of the building/buildings or have not constructed and will not construct any additional structure, without the previous consent of all the persons to whom units have been sold out, until the property is conveyed in the name of the society, after its registration.

3. The Plaintiffs complain that despite this undertaking, Defendant No.1 has obtained an approval for constructing another building by amending the original sanctioned plan. This approval was accorded by the Bombay Municipal Corporation by its order dated 28th

November 2003. The Plaintiffs contend that this approval has been granted in violation of the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "MOFA") and the Development Control Regulations. According to the Plaintiffs, there is no FSI available for construction of a new building on the property. The Plaintiffs contend that the flat purchasers of the two buildings had bought the flats on the representation made by Defendant No.1 that 20% of the area would be reserved as a recreation ground i.e. 1246.06 sq.mtrs. The Plaintiffs had filed a Writ Petition being Writ Petition No.471 of 2002 before this Court against Defendant No.1 as they found that he had entered into an agreements of sale with the purchasers of the row houses, giving them the right to exclusively use part of the recreational ground adjacent to the row house. In that Writ Petition, Minutes of Order were signed by the parties on 3rd April 2002. The purchasers of the row houses were directed to demolish the wall including the recreational ground as they could not claim exclusive right over the same. They were directed further to withdraw the Suit filed by them in the Bombay City Civil Court. Defendant No.1 herein, i.e. the builder, was given liberty to apply to the Bombay Municipal Corporation to relocate the recreational ground on the

property in accordance with law. It was further directed that the Petitioners i.e. the Plaintiffs herein, would be afforded a personal hearing in respect of any objections they had regarding relocation of the recreational ground.

4. Accordingly, the Plaintiffs were invited to submit their objections to the proposed amendment to the lay out plan for relocation of the recreational ground. The Plaintiffs brought several factors to the notice of the Bombay Municipal Corporation through their letters, including the fact that any amendment to the lay out plan and relocation of the recreational ground would entail the violation of the provisions of MOFA. The Plaintiffs also pointed out that Defendant No.1 had no right to either relocate the recreational ground or to construct a new building without the consent of the Plaintiffs and their members. It appears that despite these objections, the Bombay Municipal Corporation has approved the plans submitted by Defendant No.1. This has been done by the order dated 20th November 2003. The Plaintiffs have, therefore, sought an injunction against the Defendants restraining them from constructing any additional structure and from relocating the recreational ground.

5. Defendant No.1, on the other hand, has claimed

that he continues to be the owner of the property and is therefore entitled to develop the same. The original sanctioned plan permitted the development of the plot in a phased manner, according to him. Defendant No.1 contends that in view of the Minutes of the Order signed by the parties in Writ Petition No.471 of 2002, the Plaintiffs had no right to question the development proposed by Defendant No.1. It is also contended by Defendant No.1 that once the plans have been approved by the Bombay Municipal Corporation, a Civil Court ceases to have jurisdiction and, therefore, no injunction can be passed in the present Suit against Defendant No.1. It is also pointed out that since the occupation certificate of the D wing and row houses of "Amrat" has not been granted so far, there is no need to convey the property to the Plaintiffs and hence there is no breach of the provisions of MOFA. Defendant No.1 has also averred in his affidavit in reply to the Motion, that the relocation of the recreational ground which admeasures 1246.06 sq.mtrs. in the original plan, is in accordance with law and the Development Control Regulations. The proposal which has been accorded sanction increased the area available for the recreational ground to 1769 sq.mtrs. The original proposal for 87 car parking spaces has also been increased to 96 with extra parking space for the residents of the proposed building. The only difference

is that the recreational ground would not be a contiguous area but would be fragmented and it would therefore be possible to enjoy it in different spaces on the property. This, according to Defendant No.1, is done in accordance with the Development Control Regulations which permit such fragmentation. It is then contended that the flats have been sold upto 1990 at a particular rate while after the Development Control Regulations were enforced in 1991, the flat prices were reduced on the footing that Defendant No.1 would be able to construct a new building and recover the costs from the new flat purchasers.

6. The learned Counsel for the Plaintiffs has submitted that since the Plaintiffs were registered as co-operative societies in 1998 and 2000, they were entitled to a conveyance in their favour. Under the MOFA, once the minimum number of persons required to form a society have purchased the flats in a building, it is incumbent on the promoter to register the society of the flat purchasers and to convey the property within four months of the registration of the society. According to the learned Counsel, there is no FSI available on the property and Defendant No.1 has, without consent of the flat purchasers, sought to amend the original sanctioned plan for erecting an additional building on the plot. It is further submitted that the

undertaking given by Defendant No.1 before the Registrar of Co-operative Societies must be complied with by Defendant No.1 and any violation of this undertaking would mean that he has acted contrary to law. He submits that under the Development Control Regulations 23, 28(b) and 29(1), Defendant No.1 has no right to construct a new building on the property by fragmenting the recreational ground and, therefore, an injunction must follow. It is further pointed out that the agreements of sale executed between Defendant No.1 and the flat purchasers, indicate that any additional construction on the part of Defendant No.1 would be possible only with the specific consent of the flat purchasers. It is contended that no FSI is available and Defendant No.1, on account of his own defaults in not conveying the property, cannot take undue advantage and claim that he continues as the owner of the property. He relies on the judgments in the case of *Madhuvihar Co-operative Housing Society and others* vs. *M/s.Jayantilal Investments and others*, **First Appeal No.786 of 2004 and First Appeal No.989 of 2004**, *Ravindra Mutenja and others* vs. *M/s.Bhavan Corporation and others*, **2003 (3) ALL MR 521**, *D.M.V.R. Welfare Association* vs. *Mormugao Municipal Council*, **AIR 2002 BOMBAY 258** and *Gayatri Dham Co-operative Housing Society Ltd.* vs. *Satellite Developers Pvt. Ltd. and others* in **Notice of Motion No.3810 of 2005 in Suit No.2925 of**

2005.

7. Ms.Ankleshwaria for Defendant No.1 submits that the Plaintiffs have no right whatsoever to an injunction and that this litigation has been instituted only to blackmail Defendant No.1 into giving up his legitimate right to carry out and complete the development of his property in a phased manner. She submits that till such time as the suit property is conveyed, Defendant No.1 has the right to construct a new building, in accordance with law. According to her, since the occupation certificate of the D wing of the building "Amrat" has not been sanctioned by the Bombay Municipal Corporation, Defendant No.1 continues to be the owner and has a right to develop the property as he chooses. Therefore, according to the learned Counsel, there is no need to obtain any specific consent from the flat purchasers either for relocation of the recreational ground or for construction of the new building on the property. The learned Counsel submits that in view of the fact that the sanctioned plan permitted development in a phased manner, the developer/builder continues to have a right over the property till the lay out was complete. She relies on the judgments in the case of *Harsharansingh Pratapsingh Gujral and others* vs. *Lokhandwala Builders Ltd. and others*, **1998 (1) Bom.C.R. 516**, *M/s.Vora Automotives Pvt. Ltd.* vs. *Gopalrao Namdeorao Pohre*

and others, **AIR 1993 BOMBAY 151** and *Mrs.Snehalata Nevatia and another* vs. *M/s.Arkay Holding Ltd. and others* in **Notice of Motion No.1642 of 1997 in Suit No.5911 of 1994**.

8. The question which arises, therefore, is whether a builder/developer is entitled to develop a property further, years after more than 60 per cent of the flat purchasers have been put in possession of the flats, after executing agreements of sale.

9. Under Section 7 of the MOFA, the builder is obliged to construct buildings and develop the property strictly in accordance with the sanctioned plan and the agreements of sale with the flat purchasers. Therefore if the original plans and the agreements specify that certain areas would be kept open, and the flat were purchased on the basis of this representation, any construction of an additional structure in the open spaces would amount to a contravention of law and the agreements. This would be so, despite the Bombay Municipal Corporation sanctioning such construction. Under Section 7A of the MOFA, it is made clear that Section 7(ii) is not to apply to the construction of any additional buildings or structures constructed or to be constructed under a scheme or project of development in the lay out after obtaining approval of a local

authority in accordance with law. Under Section 10 of MOFA, it is incumbent on the promoter i.e. Defendant No.1 herein, to submit an application to the Registrar of Co-operative Societies for registration of a co-operative society of flat purchasers, as soon as the minimum number of persons required to form a co-operative society have purchased flats. Section 11 mandates that the promoter shall take necessary steps to convey to the registering co-operative society his right, title and interest in the land and building and execute all relevant documents under Section 4 within the stipulated time under the agreement. If no time is stipulated in the agreement, Rule 9 of the Rules requires the promoter to convey the property within four months of the registration of the society of flat purchasers.

10. Admittedly, more than 60 per cent of the flat purchasers have purchased flats even prior to the submission of the plans for the third building. More than 60 per cent of the flat purchasers had purchased flats prior to 1998 in Sai Amrat and 2000 in Amrat. Therefore, it was incumbent on Defendant No.1 to execute the conveyance. In fact, Defendant No.1 had undertaken to do so before the Registrar of the Co-operative Societies when the societies were registered. Having failed to comply with the undertaking, Defendant No.1

cannot be heard to say that he continues to be the owner/developer of the plot. The submission that the Minutes of the Order signed by the parties before the Division Bench in Writ Petition No.471 of 2002 gave a right to Defendant No.1 to have his proposed plan for an additional building sanctioned, cannot be accepted. Firstly, the Minutes related only to relocation of the recreational ground. The Minutes do not in any manner refer to any additional construction on the site. Assuming Defendant No.1 did have the right to submit plans for relocation of the recreational ground, it is made abundantly clear in the Minutes that the sanction was to be accorded keeping in mind the provisions of law. It is undoubtedly true that under certain conditions, the Development Regulations do permit fragmentation of the recreational ground. However, once it has been held that the builder did not continue to have a right to have the plan sanctioned, the question of relocation of the recreational ground does not arise.

11. The Plaintiffs and Defendant No.1 had produced three agreements which, according to them, are representative of the agreements signed by all the flat purchasers. Although each of these agreements do give a right to the developer to construct additional structures if FSI was available, in my opinion, this right cannot be availed of by Defendant No.1 in

perpetuity. Each of the agreements require Defendant No.1 to convey the property to the proposed society within four months of its registration. Defendant No.1 has, for one or the other reason, failed to convey the same. The sanction for the proposed additional structure was granted by the Bombay Municipal Corporation in 2003, much after the property was expected to be conveyed, both under the agreements and as per the undertaking given by Defendant No.1 before the Registrar of Co-operative Societies. It is no doubt true that the original lay out for the property contemplated the development of the property in a phased manner by constructing the buildings Sai Amrat and Amrat. The Plaintiffs had rightly therefore not taken any objection to Defendant No.1 completing the construction. It is only when Defendant No.1 decided in 2003 to transfer development rights purchased by him on to the present building that the FSI became available for him to construct a third building. This right, in my view, could not have been exercised, prima facie, by Defendant No.1 but only by the Plaintiffs. Defendant No.1 cannot make capital of the fact that under the Minutes of the Order signed in the Writ Petition, he was permitted to apply for relocation of the recreational ground. The Minutes do not give him any right to construct a new building or develop the property in any manner except for relocation of the recreational ground.

12. The judgments cited by Ms.Ankleshwaria are in respect of development of a property in a phased manner. There can be no dispute that a builder/developer would continue to have right over the property if the development is to take place in a phased manner as held in *Harsharansingh* (supra). The Plaintiffs in the present case would, therefore, have had no right to object to the development of the building Amrat and Sai Amrat taking place in phased manner as the same has been mentioned in their agreements for sale. However, the Plaintiffs can certainly object to the development or construction of a new building without their consent as the builder cannot take undue advantage of his own breaches and wrongs.

13. Hence, Notice of Motion made absolute in terms of prayer clauses (a) and (c). As regards prayer (b), Defendant No.1 to complete the pending work in respect of Sai Amrat and Amrat within six months from today.